IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3445 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL KIRITKUMAR GOKALDAS - Petitioner(s)
Versus
OFFICER IN CHARGE & 2 - Respondent(s)

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Appearance :

MR JJ YAJNIK for Petitioner(s) : 1,
MR JD AJMERA for Respondent(s) : 1 - 2.
MR HARIN P RAVAL for Respondent(s) : 1 - 3.
MR PURVISH J MALKAN for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 24/01/2007

ORAL JUDGMENT

This petition is of the year 1996 and is adjourned time and again as the learned advocate

appearing for the petitioner has remained absent on filing sick note or for some other reasons. On 27.6.2005 as the learned advocate appearing for the petitioner had filed Sick Note the matter was adjourned and the learned Single Judge passed the order that the matter be placed for hearing after note is filed before the Registry for hearing of the matter. Thereafter, the present Special Civil Application has been notified on Board for regular final hearing in due course. On 17.1.2007, when this matter was placed for hearing, this Court passed the following order;

> *"It is reported that there is a sick note of Shri J.J. Yagnik, learned advocate appearing for the petitioner. Earlier also, this Court was required to adjourn the matter. This petition is of 1996. It is the experience of this Court that as and when the matters are called out, Shri Yagnik, learned advocate has remained absent for more than one reasons. However, in the interest of justice and as a last chance, S.O. To 24th January, 2007. On that date, irrespective of the leave note or*

sick note, the matter will be proceeded further."

Inspite of the aforesaid order, it is reported that today also there is a sick note of the learned advocate appearing for the petitioner. However, in view of the earlier order dated 17.1.2007 to the effect that on 24th January 2007 irrespective of leave note or sick note the matter will be proceeded further this petition is being decided and disposed of ex-parte. It is to be observed that normally this Court respects leave notes and sick notes, however in exceptional cases this Court is constrained to proceed with matters ex-parte when there are special reasons even when leave note or sick note is filed.

2. Present petition appears to have been filed under Article 226 of the Constitution of India for an appropriate writ, order or direction directing the respondents to relieve/discharge the petitioner from service forthwith as

recommended. It is the contention on behalf of the petitioner that he was serving as 'Medical Attendant' with the respondent authorities, i.e., in Military/Defence Services. It is his case that he wanted to apply for the post of Police Sub-Inspector, through the GPSC pursuant to advertisement given by the GPSC; Commanding Officer of the petitioner granted permission to appear at the competent examination conducted by the GPSC; after which he applied for the said post and appeared at the competent examination at Gandhinagar; he came to be selected for the post of Police Sub-Inspector by the GPSC and was required to undergo training for the same at Police Training School, Junagadh; he was informed by communication dated 22.9.1995 about his selection and was required to resume the said training at the Police Training School at Junagadh; for that purpose he was required to be relieved; and as the respondents did not accept the request of the petitioner to relieve him the petitioner has preferred the present Special

Civil Application. It is the contention on behalf of the petitioner that once permission was granted by the Commandant granting No Objection to appear in the examination and the petitioner having applied for the post it is not open for the respondents thereafter not to relieve the petitioner.

3. Affidavit-in-reply is filed on behalf of the respondents. It has been submitted in the reply that petitioner was enrolled in the Army Medical Corps on 21st October 1987 as a Nursing Assistant; his terms of engagement of service was 20/3 years; he was serving in 150 GH.C/o.56 APO (Field Area). It is submitted that an application dated 29th March 1993 for premature discharge on domestic reasons such as looking after landed property and old aged parents was made however the request for premature discharge was not considered as the deficiency of NA Cat in the Corps was 4.8% and individual had not completed terms of engagement, i.e., 20 years and

the reasons were not common nature applicable to most of the serving soldiers. It is submitted that the applicant was informed accordingly. It is further submitted that the petitioner again submitted dated 1st December 1995 for seeking premature discharge from service on similar domestic grounds which was re-examined in detail by Records Office, AMC and was not considered for premature discharge as the deficiency of NA CAT in the Corps was 11.36%, and the petitioner was informed accordingly. It is further submitted in the reply that the petitioner while serving in 150 GH.C/o. 56 APO was granted 10 days Advance of Annual Leave by the Commanding Officer from 20th March 1996 to 29th March 1996, and he did not report to his unit on 29th March 1996 (AN) after expiry of the said leave and remained absent without leave. It is further submitted that the petitioner is a deserter from the Army with effect from 30th March 1996. It is further submitted that 150 General Hospital vide letter No. 1314/Coy. dated 12th April 1996 has forwarded

apprehension Roll with full details to the Superintendent of Police, Dist-Sabarkantha (Gujarat) and Police Station, Torda, Dist-Sabarkantha (Gujarat) to apprehend the deserter and handover to the nearest Military Unit but the deserter has not yet been apprehended by the police authorities. Therefore it is requested to dismiss the present Special Civil Application.

4. Considering the affidavit-in-reply, it appears that there was justification in not relieving the petitioner. Apart from that, as stated hereinabove the petitioner is a deserter from the Army with effect from 30th March 1996 and without any leave of the concerned department and/or the authority the petitioner has absconded and not reported for the duty. This being a petition under Article 226 of the Constitution of India, this Court is having discretionary jurisdiction. Considering the above, this Court is of the opinion that discretion in favour of the petitioner is not required to be exercised

particularly when the petitioner himself is a deserter from the Army w.e.f., 30th March 1996. Even otherwise, as stated above, there was a justification for not relieving the petitioner from service as mentioned in Paragraph 4.c) of the affidavit-in-reply. Merely because the petitioner was granted permission to appear in the examination, it does not mean that the petitioner was required to be relieved on being selected. It depends upon the fact whether the petitioner has completed requisite years in the Service or not and/or on the question whether there is justification for not relieving the petitioner due to the deficiency of NA CAT in the Corps.

5. For the reasons stated above, the present Special Civil Application is required to be

dismissed and is accordingly dismissed. Rule is discharged. No costs.

[M.R. Shah, J.]

rmr.